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NO. 36632-4-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

SIEGFRIED SCHEELER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIA COUNTY

The Honorable Michael McCarthy, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated Scheeler's Due Process rights when it denied his motion to continue the sentencing hearing.

2. The trial court erred by failing to vacate Scheeler's conviction for count 1 (first degree assault) after finding the conviction violated principles of Double Jeopardy.

3. The trial court erred by imposing various Legal Financial Obligations (LFOs) despite finding Scheeler indigent, including the costs of community custody, non-restitution interest, and costs of collections.

Issues Pertaining to Assignments of Error

1. The trial court was aware that a snowstorm had caused considerable travel delays for individuals who planned to participate in the sentencing hearing and that numerous defense witnesses had planned to attend but were not present. In contrast, the State had not planned for any witnesses and none were present. Moreover, Scheeler's bail had been revoked and the agreed upon standard range sentence for attempted second degree murder was 92.25 to 165 months plus a mandatory consecutive 60-month firearm enhancement, meaning there were no identifiable reasons to hold the hearing immediately. Given the above, did the trial court violate Scheeler's Due Process rights by denying him (and his witnesses) a

meaningful opportunity to be heard when it denied his motion to continue the sentencing hearing and then imposed a mid-range sentence?

2. The prosecutor argued the first degree assault (firing a shotgun) was the “substantial step” element of the attempted murder charge. As a result, the trial court correctly found principles of Double Jeopardy would not sustain convictions on both counts 1 (assault I) and 4 (attempted murder II). The trial court found count 1 “merged” and then correctly declined to impose a sentence on count 1. However, the court failed to vacate count 1, and left references to this conviction on the Judgement and Sentence and Warrant of Confinement. Do principles of Double Jeopardy require remand to vacate the conviction for count 1?

3. Did the trial court violate RCW 10.01.160(3) and 10.82.90 by imposing the costs of community custody, costs of collections, and non-restitution interest on an indigent defendant?

B. STATEMENT OF FACTS

1. Initial Charges & Pleas

The Yakima County Prosecutor’s Office charged Siegfried Scheeler with first degree assault-DV with a firearm (count 1), fourth degree assault-DV (count 2), first degree attempted murder-DV with a firearm (count 3), and second degree attempted murder-DV with a firearm (count 4). RP 42. The State further alleged Scheeler repeatedly struck his

wife Peggy Thomas with his fists and then aimed a shotgun at her head and fired three times intending to kill her, but was unsuccessful only because Thomas grabbed the barrel of the gun and redirected the shots away from herself each time. CP 2; see also RP 416.

The State's theory of the case was that counts 1, 3 and 4 involved the same conduct: the attempted murder II was a lesser-included charge to the attempted murder-I (requiring the jury to determine whether or not there was premeditation), and the "substantial step" toward the attempt was the firing of the gun—the same conduct that constituted the first degree assault. See RP 417-18 (State's closing argument), 480 (State's sentencing argument).

Scheeler pleaded not guilty and the case proceeded to jury trial. RP 43.

2. Jury Trial Evidence

During the trial, the State relied heavily on Thomas's testimony. See RP 403-04 (State's closing argument). Thomas testified to the following:

Scheeler had become intoxicated and he and Thomas had argued over his intention to visit an ex-girlfriend, Shana Zutter, in order to obtain assistance investigating a prior burglary of his father's home. RP 180-81. Thomas testified that during the argument, Scheeler repeatedly struck her

with his fists until she was doubled over and fell unconscious. RP 183, 186-88. She also testified that she struck Scheeler with a metal frying pan, but she claimed she had done so in self-defense and had “checked” her swing. RP 184, 225, 232.

Thomas testified that Scheeler then retrieved a shotgun from the bedroom, aimed it at her, and while cursing and stating he was going to kill her, pinned her to the ground and used the barrel of the gun to try to turn her head to the side. RP 188, 191. Although he fired twice, she grabbed the barrel and forced it away both times, redirecting the shots toward the kitchen door behind her. RP 191-92. She then pushed the gun away and let go, and Scheeler fired a third shot, which she believed had not been aimed at her. RP 193, 222, 234. He then told her to shower and, after berating her further, dressed himself with her assistance and then left to visit Zutter. RP 193, 197, 199. After Scheeler left, Thomas called police. RP 200.

Officers testified they obtained a statement from Thomas and observed injuries and damage to the home that were consistent with her story. E.g. RP 235, 261, 283, 286. An officer observed Scheeler driving his vehicle away from his home and arrested him. RP 168-70.

On cross-examination of a State witness, Scheeler’s counsel emphasized an apparent inconsistency in Thomas’s statements – that she

had testified she had told an officer and previous defense counsel that Scheeler had tried to murder her, but in fact had not used the specific term “murder” in her statement to the officer or defense counsel. Compare RP 235 (Thomas testimony) with RP 293-94 (officer testimony that Thomas has told him Scheeler tried to “kill” her but did not specifically use the term “murder”); see also RP 270 (defense argument regarding inconsistent statements).

Defense counsel also briefly recalled one law enforcement officer to clarify that he had written in his report that Thomas had accompanied officers back into the home to point out evidence, although another officer had testified Thomas had never re-entered the home. Compare RP 340 (Deputy Derrick Perez testimony that he was certain Thomas never re-entered the home) with RP 370 (Sergeant Cory Sanderson testimony that Thomas did accompany them into the home). Scheeler did not testify at trial, and the defense called no other witnesses. RP 369, 371.

3. Closing Arguments & Verdicts

In closing, both parties agreed Thomas’s credibility was the core disputed issue at trial. RP 401-02 (State), 430 (defense). The State argued Thomas was credible and was corroborated by evidence at the scene. RP 446-47. The defense argued Thomas was not credible and that, after striking Scheeler with the frying pan out of jealousy, she had

manufactured a story, as well as injuries and damage to the house, to avoid jail and obtain Scheeler's property in the now-pending divorce action. RP 437, 444-45.

The prosecutor also made clear elections regarding the various charges. The State argued the fourth degree assault charge was "basically the non-gun part of the many assaults" including the alleged conduct of striking Thomas with his fists and pressing down on her until she passed out. RP 414; see also RP 406. The prosecutor also argued "[b]asically assault 1, attempted murder 1 and attempted murder 2 all address the same facts." RP 406. He reasoned a first degree assault occurred when Scheeler fired the shotgun at Thomas. RP 406, 413. The State argued the first degree assault conduct, i.e. pulling the trigger, also constituted the substantial step element of the attempted murder charges. RP 417. The State argued the jury should return either a first or second degree attempted murder charge, depending on whether it believed Scheeler's conduct was premeditated or not. RP 416-18.

The jury found Scheeler guilty of fourth degree assault-DV, first degree assault-DV, and second degree attempted murder-DV, and found him not guilty of first degree attempted murder. CP 41-52; RP 463-64. The jury further found the first degree assault and attempted murder II convictions involved a firearm. CP 45, 51.

4. Sentence & Appeal

The sentencing hearing occurred in Yakima County Superior Court on February 22, 2019. RP 501. The hearing started around 10:00 A.M., one hour late, because defense counsel had difficulty traversing the mountain pass. RP 479. Counsel explained authorities had altered the speed limit over the pass to 35 mph as a result of a major snowstorm, and this had caused unexpected travel delays. RP 479. Counsel also explained that multiple defense witnesses had planned to attend the hearing and speak on Scheeler's behalf, including Shana Zutter and four other members of the community. RP 478. These witnesses were prepared to speak on various topics including Scheeler's character, employment history, and history in the community, among other things. RP 478. Counsel believed the snowstorm had impacted these witnesses' ability to attend. RP 478. He expressed a concern that the snowstorm had prevented them from traveling to the hearing, or they may not be present because they believed the court would be closed due to the inclement weather. RP 478. Counsel requested the hearing be continued to allow these witnesses to attend and speak on Scheeler's behalf. RP 477.¹

¹ Counsel also requested a continuance for the purpose of continuing the Superior Court's jurisdiction and allowing Scheeler to remain in the county and represent himself pro se at his upcoming dissolution matter with Thomas. RP 477, 479. The trial

The State had no witnesses in attendance, and explained it had not expected any as Thomas had chosen not to attend out of concern she would be harassed by a third party. RP 481. However, the State was generally opposed to any delay. RP 477. The trial court pointed out counsel could offer no specific details on the witness's current whereabouts and so denied the motion. RP 479.

The hearing proceeded. The State discussed Thomas's wish for a life-long no contact order and argued for a sentence at the high end of the standard range. RP 481. The court heard argument from the defense and allocution from Scheeler, who explained the background circumstances of his relationship with Thomas as well as the couple's financial circumstances. RP 485-88 (defense counsel), 489-513 (allocution).

During the hearing, the trial court also addressed the issue of Double Jeopardy. Prior to sentencing, the parties and trial court were aware, and in fact agreed, that under the facts of this case, convictions for both the first degree assault and attempted murder charges would create a Double Jeopardy or merger issue, but the court determined it would resolve the issue at sentencing. RP 362. At the sentencing hearing, the State argued the two convictions were the "same criminal conduct" so

court denied the motion on those grounds as well, believing it would be sufficient to sign an order not to transport Scheeler until after the dissolution matter. RP 477, 479.

they would not score against one another and required concurrent sentencing, but reasoned the convictions did not “merge.” RP 480, 482. Defense counsel argued the first degree assault and attempted second degree murder convictions did merge. RP 482.

The trial court found the first degree assault conviction “merge[d]” with the attempted second degree murder conviction. CP 54 (finding “Count 1 ~~and~~ merges into Count 4”) (strikethrough in original); RP 516. Although the court correctly declined to impose a sentence on count 1, it did not vacate the conviction and left multiple references to this conviction in the Judgment and Sentence and Warrant of Confinement.²

The parties ultimately agreed that the sentencing range for count 4 (attempted murder II) was 92.25 months to 165 months plus a mandatory consecutive 60-month firearm enhancement. RP 483-84; see also CP 54. The trial court ultimately imposed a mid-range sentence of 140 base months plus the 60-month consecutive firearm enhancement on the attempted murder II conviction. CP 55; RP 516. The court also imposed 364 days on the assault IV conviction to run concurrently. CP 55.

² CP 53 (listing count 1), 54 (listing DV and firearm enhancements relevant to count 1), CP 55 (finding defendant “guilty of the counts and charges listed I paragraph 2.1” in reference to prior statement of conviction under count 1), 60 (“Warrant of Confinement” listing conviction for “COUNT 1 – FIRST DEGREE ASSAULT – DOMESTIC VIOLENCE”).

The trial court acknowledged Scheeler's statements regarding his own financial circumstances, noted a finding of indigency was potentially in conflict with aspects of Scheeler's statements, and still elected to find Scheeler indigent. RP 516. The court orally imposed only the \$500 victim penalty assessment and \$100 DNA fee (noting he had no prior felony convictions). RP 516-17. In accord with this oral pronouncement, the court waived all other legal financial obligations (LFO) listed on the LFO section of the judgement and sentence. CP 57.

However, in the written Judgment and Sentence, in the middle of a long list of community custody conditions requiring no affirmative mark by the trial court, the court imposed the costs of community custody. CP 56 (item 6 of 17). The court also imposed interest on all LFOs, making no distinction between restitution and non-restitution LFOs, "at the rate applicable to civil judgment." CP 58 (section 4.D.9). And the court ordered that Scheeler "shall pay the costs of services to collect unpaid legal financial obligations." CP 58 (section 4.D.9).

Scheeler timely appeals. CP 62.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED DUE PROCESS WHEN IT DENIED SCHEELER'S MOTION TO CONTINUE THE SENTENCING HEARING.

The Due Process Clause of the federal Constitution provides, “nor shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. CONST., AMEND. XIV. At a minimum, this Amendment guarantees an accused the right to notice and the opportunity to be heard. State v. Rogers, 127 Wn.2d 270, 275, 898 P.2d 294 (1995), superseded by statute on other grounds as recognized in State v. Nolan, 141 Wn.2d 620, 623-24, 8 P.3d 300 (2000). This right to be heard is applicable to sentencing hearings, as both a constitutional floor and statutory right. State v. Deskins, 180 Wn.2d 68, 82, 322 P.3d 780 (2014) (majority applying Due Process and finding no violation); see also id. at 87-88 (McCloud, J., dissenting in part, and finding Due Process violation); also RCW 9.94A.500(1).

Washington's applicable statute provides in relevant part:

Before imposing a sentence upon a defendant, the court shall conduct a sentencing hearing. ... Upon the motion of either party for good cause shown, or on its own motion, the court may extend the time period for conducting the sentencing hearing. ... The court shall ... allow arguments from ... the defense counsel [and] the offender ... as to the sentence to be imposed.

RCW 9.94A.500(1).

Generally, the statutory and rule-based right to a continuance is “largely within the discretion of the trial court” to be disturbed only upon a showing of prejudice to the defense, meaning “the result would likely have been different.” Deskings, 180 Wn.2d at 82 (quoting State v. Eller, 84 Wn.2d 90, 95, 524 P.2d 242 (1974)). While motions for continuance are generally reviewed for abuse of discretion, the Washington State Supreme Court has noted that such motions in a criminal context implicate constitutional Due Process rights. Eller, 84 Wn.2d at 95; see also State v. Sutherland, 3 Wn. App. 20, 21-22, 472 P.2d 584 (Div. II.1970) (discussing abuse of discretion and Due Process).

Both the Washington and U.S. Supreme Courts have noted, “there are no mechanical tests for deciding when the denial of a continuance violates due process, inhibits a defense, or conceivably projects a different result; and, that the answer must be found in the circumstances present in the particular case.” Eller, 84 Wn.2d at 96 (citing Ungar v. Sarafite, 376 U.S. 575, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964); State v. Cadena, 74 Wn.2d 185, 443 P.2d 826 (1968)).

Washington Courts have generally applied a balancing test, and in the context of a motion for continuance in a criminal matter, this balancing involves weighing a defendant’s diligence and reasoning against the trial court’s reason for the denial, as well as considering whether the testimony

sought to be offered was “speculative and uncertain,” “merely cumulative,” or would otherwise have no potential impact on the outcome of the hearing. Eller, 84 Wn.2d at 95-96; Deskins, 180 Wn.2d at 87 (McCloud, J., dissenting in part) (citing State v. Hartwig, 36 Wn.2d 598, 599-601, 219 P.2d 564 (1950)); see also Rogers, 127 Wn.2d at 275-76 (general balancing of interests in Due Process claims impacting notice and opportunity to be heard).

For example, in Hartwig, the Washington Supreme Court found the trial court violated Due Process when it denied a defendant’s requests for a trial continuance. 36 Wn.2d at 599-601. Relevant factors included that the originally assigned attorney had a conflicting duty to appear in the Court of Appeals on the date of trial, the court was informed of this conflict, the defense made a timely motion for continuance, the newly appointed attorney stated he was not prepared to represent the defendant, and the trial court had open dates on its calendar. Id.

Similarly, in State v. Edwards, the Washington Supreme Court granted a new trial on the grounds that the trial court had violated Due Process by failing to grant a brief continuance to allow defense counsel to serve two compulsory subpoenas on witnesses who he believed would testify but who had unexpectedly failed to appear at trial. 68 Wn.2d 246, 258-59, 412 P.2d 747 (1966). On balance, the factors favored granting the

request where the defense asked for only a brief 45-minute continuance that would not be unduly disruptive of the trial. Id. at 248. The circumstances were not due to a failure of diligence by the defense, who had already served civil subpoenas on the witnesses and had made arrangements to have the witnesses appear at trial. Id. at 248. And defense counsel made a clear record of the material issues he believed these witnesses' testimony would address. Id. at 253-54.

In State v. Alltus, the Court of Appeals found the trial court had abused its discretion where it had declined the defense request to bifurcate the sentencing hearing. 447 P.3d 572 (Div. III.2019) (pub. in part).³ Although the State had witnesses present and ready to speak, the defense requested to bifurcate the hearing, in order to allow the State's witnesses to speak without compromising the defense ability to prepare a presentence report to develop the defendant's juvenile status and related mitigating facts. Id. at 574-75.

In Alltus, Division Three found the trial court abused its discretion for several reasons. First, defense counsel's request balanced the need for the State's witnesses to give their testimony at the hearing. Id. at 576. Second, the requested continuance would allow a reasonable amount of

³ In accordance with GR 14.1, this brief cites only the published portion of the opinion.

time for defense counsel to prepare the presentence report (i.e. there was no lack of diligence). Id. Third, the defense identified specific matters that would be included in the presentence report, including the “defendant’s characteristics” and “circumstances affecting the defendant’s behavior as may be relevant in imposing sentence,” and these included matters that courts are required to consider prior to any sentencing. Id. at 576-77 (citing CrR 7.1(b)). Finally, many of the identified issues dealt with the defendant’s youthfulness and related characteristics, matters that courts are specifically required to consider when sentencing juveniles. Id. at 576-77 (citing State v. Houston-Scioners, 188 Wn.2d 1, 20, 391 P.3d 409 (2017); U.S. CONST., AMEND. VIII).

Scheeler’s case has many similarities with Edwards, Hartwig and Alltus, and this Court should find the balance of factors weighs in favor of finding reversible error for failure to grant the sentencing continuance.

Factors favoring the court’s denial of a continuance are slight to non-existent. The State had no witnesses arranged and expected none in the future. RP 481. Scheeler’s bail had been revoked at the reading of the verdicts and so there was no concern regarding his future appearances. RP 473. This shows the State could not be prejudiced by the delay.

The record suggests no reason to believe the trial court was unavailable to hold another sentencing hearing in the reasonably near

future. The agreed-upon standard range for sentencing was 152.25-225 months, meaning a lengthy prison sentence would likely be imposed, though the specific amount was contested. RP 483-84; see also CP 54. The defense was the party requesting the continuance with no objection from Mr. Scheeler, meaning a waiver of speedy sentencing rights would likely be forthcoming if necessary. RP 477.

All of these factors combine to suggest there was no reason why the sentencing needed to be resolved that day and no later. The only factor weighing in favor of the court's ruling is a general desire for judicial expedience.

By contrast, several factors favored the continuance. Defense counsel made reference to his diligent efforts to communicate with five character witnesses from the community, including Ms. Zutter specifically. RP 478. Counsel made diligent efforts to be timely to the hearing – his hour-long delay was due to challenging traffic conditions caused by a snowstorm. RP 479. As defense counsel pointed out, other witnesses were likely experiencing travel delays, or assumed the court would be closed, given the unusual inclement weather. RP 477-78. Counsel cannot be faulted for his failure to anticipate a violent and unexpected storm – defined in law as an “act of God.” Wells v. City of Vancouver, 77 Wn.2d 800, 803, 467 P.2d 292 (1970) (quote). Rather, this

is akin to the surprise failure of witnesses to appear at Edwards's trial. Edwards, 68 Wn.2d at 248.

Also similar to the defense counsel in Edwards, defense counsel in Scheeler's case made a record of the factors he expected the witnesses to address had they been present: namely Scheeler's background, character in the community, employment history, and other matters. RP 478. As noted in Alltus, a defendant's character and financial circumstances are issues a trial court must consider prior to imposing a sentence. CrR 7.1(b) (requiring these factors to be included in a presentencing report), (c) (providing opportunity for defense to contest any such factors in the report at the sentencing hearing); see also State v. Ramirez, 191 Wn.2d 732, 746, 426 P.3d 714 (2018).

CrR 7.1(b) and (c) provide a specific process by which the State can allege facts in a presentence report and the defense can rebut these facts at a hearing. However, the Washington State Supreme Court has rejected strict adherence to formal court rules and procedures where the failure to follow such process is not due to a defense lack of diligence, reasonable accommodations are available, and a criminal defendant's Due Process rights are at stake. Edwards, 68 Wn.2d at 258 ("No rule of criminal procedure can or ought to be construed or applied so as to abridge a fundamental constitutional right.") This Court should follow Edwards

and conclude the trial court erred by failing to grant Scheeler's reasonable request for a continuance.

This Court should find in the balance of factors, the trial court violated Scheeler's Due Process right to be heard when it denied his motion for a continuance to allow the weather to abate and his witnesses to appear on his behalf at his sentencing hearing.

2. THE TRIAL COURT VIOLATED DOUBLE JEOPARDY BY FAILING TO VACATE COUNT 1.

The trial court violated Double Jeopardy when it left multiple references to Scheeler's first degree assault conviction on his Judgment and Sentence. The proper remedy is remand to vacate the first degree assault conviction. State v. Womac, 160 Wn.2d 643, 649, 160 P.3d 40 (2007).

A claim of Double Jeopardy violation and an assessment of the proper remedy are issues of law reviewed *de novo*. Id. (citing State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)).

The federal Constitution provides, "[n]o person shall ... be subject for the same offense to be twice put in jeopardy of life or limb...." U.S. CONST., AMEND. V. The Washington Constitution affords "the same scope of protection" and similarly provides "[n]o person shall be ... twice put in jeopardy for the same offense." In re Pers. Restraint of Percer, 150

Wn.2d 41, 49, 75 P.3d 488 (2003) (citing State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995)); WASH. CONST., ART. I, §9.

The Double Jeopardy doctrine protects defendants against “prosecution oppression,” including “(1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense imposed in the same proceeding.” Womac, 160 Wn.2d at 650-51 (quoting 5 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, Criminal Procedure, § 25.1(b), at 630 (2d ed.1999)) (quoting Percer, 150 Wn.2d at 48-49 (citing State v. Bobic, 140 Wn.2d 250, 260, 996 P.2d 610 (2000); Gocken, 127 Wn.2d at 100)).

In Womac, the Washington Supreme Court held that where a trial court found sentencing for multiple convictions would violate Double Jeopardy, to leave the convictions on the defendant’s record, rather than vacating them, also violates Double Jeopardy because the defendant “remains exposed to danger” of resentencing on the remaining convictions. Womac, 160 Wn.2d at 651.

There, the State had obtained convictions for homicide by abuse, felony murder II (with the predicate offense of criminal mistreatment in the first or second degree), and assault of a child in the first degree, all related to his actions toward one victim in one instance. Id. at 647-48.

The trial court determined Double Jeopardy would be violated by sentencing on all three convictions, but chose merely to avoid sentencing Womac on two of the counts rather than dismissing the offending convictions. Id. at 648.

The Womac Court, quoting the defendant's trial counsel, explained the problem as follows:

[I]t is unjust

to find a double jeopardy violation and hold these convictions in a safe for a rainy day, in the event that the homicide by abuse gets reversed ... then they can sort of rise from the dead like Jesus on the third day and bite my client, and he can be sentenced on convictions that the court already ruled violated double jeopardy.

Id. at 651 (quoting trial counsel).

Here, the prosecutor repeatedly agreed his theory of the case was that Scheeler had committed an attempted murder by means of a first degree assault as the substantial step element of the attempt. RP 417-18 (State's closing argument), 480 (State's sentencing argument). Thus, just as in Womac, the trial court here correctly determined that principles of Double Jeopardy barred sentencing on the first degree assault conviction. RP 362 (reference to Double Jeopardy), 516 (finding that offense "merges"; CP 54 finding offense "merges"). Also just as in Womac, the trial court here left the offending conviction on the record and simply

declined to impose a sentence on that count. CP 54; see also CP 53, 55, 60 (remaining references to Assault I conviction).

This was error and requires remand to vacate Scheeler's conviction for first degree assault-DV with a firearm. Womac, 160 Wn.2d at 649, 651.

3. THE TRIAL COURT'S IMPOSITION OF COMMUNITY CUSTODY AND NON-RESTITUTION INTEREST ARE UNLAWFUL.

- i. The trial court violated the recently amended statute on LFOs by imposing the costs of community custody and collections.

The recently amended legal financial obligations (LFO) statute prohibits the imposition of costs (with few exceptions not applicable here) on a defendant who is indigent at sentencing. RCW 10.01.160(3). Here, the trial court imposed the discretionary costs of community supervision and collections. CP 56, 58. This violated the statute where Scheeler was and remains indigent, and these costs appear to have been imposed inadvertently. The proper remedy is to remand to strike the costs.

RCW 10.101.010(3) defines "indigent" as including a person (c) whose income is 125% or less than federal poverty guidelines, or (d) whose "available funds are insufficient" to contribute to attorney costs in the matter before the court. RCW 10.101.010(3).

The record establishes Scheeler was and remains indigent. The trial court expressly found Scheeler indigent, both orally and in written findings in the judgment and sentence. RP 516; CP 54 (finding Scheeler indigent because he “receives an annual income, after taxes, of 125 percent or less of the current federal poverty level.”) As part of his motion for an appeal at public expense, Scheeler later submitted a declaration of his financial circumstances, stating he had substantial debts (\$14,700); no income, cash or savings; a modest amount of personal property (\$18,300); and some real estate subject to a pending dissolution action with his wife. CP 73-74. Scheeler had also been represented at trial and sentencing by a public defender, and asserted he had “been totally unable to retain an attorney to assist in my dissolution case.” CP 74 (noting “Yakima Department of Assigned Counsel” on pleadings). In his declaration, Scheeler also stated he would “immediately report to the Court any change in my financial status which materially affects the Court’s finding of indigency.” CP 74. On the basis of this declaration, the trial court signed an “Order of Indigency...” and granted his motion to appeal entirely at public expense. CP 76-77. This amounts to a finding by the trial court that Scheeler both was and remains indigent.

At the sentencing hearing the trial court stated only that it would impose the Victim Penalty Assessment (VPA) and DNA fees. RP 516-17.

Consistent with this oral pronouncement, in the “FINANCIAL OBLIGATIONS” section of the judgment and sentence the court struck the criminal filing fee, court-appointed attorney recoupment fee, and DV assessment fees, and imposed a hand-written total of \$600. CP 57. The court also left blank boxes next to, and thus declined to impose, the costs of incarceration and costs of medical care. CP 57.

Despite the trial court’s finding of indigency during the sentencing hearing, the court imposed the following condition: “Pay supervision fees as determined by the Department of Corrections.” CP 56 (Section 4.C.2, item 6 of 17). This language was imposed in pre-printed text, with a pre-typed “x” in each box next to each condition under a heading entitled “Conditions of Community Custody or Probation.” CP 56. As such, the terms are general and required no affirmative mark by the trial court in order to impose them. CP 56. As can be seen by court’s line striking the condition relevant to urinalysis and polygraph for drug use, the language was pre-typed by the prosecutor’s office and in fact required an affirmative mark in order to reject the condition. See CP 56 (showing hand-written alterations in items 15 and 16 of 17).

The trial court also imposed the costs of collections on Scheeler with the following language: “The defendant shall pay the costs of services to collect unpaid legal financial obligations.” CP 58 (4.D.9

“Interest, Judgment, and Collection”). This language was also imposed in a block of pre-printed text requiring no affirmative mark by the trial court. CP 58.

This Court should find Scheeler was indigent at the time of sentencing and the amended LFO provision in RCW 10.01.160(3) applies. The imposition of community custody costs and collection costs violated the LFO statute, and these costs must be stricken.

In State v. Lundstrom, the Court noted the sentencing court intended to impose only mandatory fees, yet imposed discretionary community custody costs, apparently through an oversight. 6 Wn. App. 388, 396, 396 n.3, 429 P.3d 1116 (2018). This is similar to what occurred here.

Here, the court expressly found Scheeler “indigent” and expressly waived the otherwise mandatory criminal filing fee, imposed only the mandatory \$500 VPA and \$100 DNA fee, left other empty spaces for various costs and fees blank, and imposed the costs of collections and community custody only by pre-printed text. CP 54, 56, 57, 58; RP 516-17. Combined with the oral finding of indigency and oral mention of only the VPA and DNA fees, this strongly suggests the court intended to impose these and only these costs. See RP 516-17 (discussing only VPA and DNA fees).

Elsewhere in the record, the court both implicitly and expressly found Scheeler indigent. RP 516; CP 54; see also CP 76-77 (signing “ORDER OF INDIGENCY...”). Yet the court imposed the community custody costs and collection costs buried in lengthy blocks of pre-printed text. CP 56. 57. This shows the costs of community custody and collections were likely imposed through mere oversight, just as in Lundstrom.

Where, as here, the cost violates recent statutory amendments, the court should remand to strike the unauthorized costs. Ramirez, 191 Wn.2d at 746. Resentencing on this issue is unnecessary where the court found Scheeler indigent and appears to have imposed the costs inadvertently. See Lundstrom, 6 Wn. App. at 396, 396 n.3.

- ii. The trial court’s imposition of non-restitution interest on LFOs is unlawful.

The trial court also imposed interest on all LFOs imposed by the Judgment and Sentence at the rate applicable to civil judgments. CP 58 (4.D.9 “Interest, Judgment, and Collection”).

RCW 10.82.090 requires the court to impose interest on restitution costs. RCW 10.82.090(1). However, the statute also states, “As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations.” RCW 10.82.090(1). In addition, the statute provides “[t]he

court shall waive all interest on the portions of the legal financial obligations that are not restitution that accrued prior to June 7, 2018.” RCW 10.82.090(2)(a).

This Court should remand to modify the sentence to strike the imposition of non-restitution interest and to refund or waive any interest deemed to have accrued since this term of the judgement and sentence was wrongfully imposed.

D. CONCLUSION

The trial court violated Scheeler’s Due Process rights by failing to continue the hearing until after the snowstorm to allow his witnesses to speak on his behalf, violated Double Jeopardy by failing to vacate his conviction for count 1 (first degree assault – DV with a firearm), and violated RCW 10.01.160(3) and RCW 10.82.090 by imposing prohibited LFOs despite his indigency.

Scheeler respectfully requests that this Court remand for resentencing to allow defense character witnesses to speak on his behalf, to vacate count 1, and to strike the costs of community custody and collections, strike non-restitution interest and waive or refund any non-restitution interest that has been wrongfully collected or accrued.

DATED this 28th day of October, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, reading "E. Rania Rampersad".

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